APPENDIX A

Order

[Dated Aug. 10, 1965]

The present question before the Court arising out of this action is whether or not plaintiffs' complaint should be dismissed in accordance with defendants' separate motions submitted on the ground that the complaint fails to state a claim upon which relief can be granted. Rule 12(b)(6) of the Federal Rules of Civil Procedure.

The facts of this case relevant to the pending motions can be briefly stated. Some time prior to the filing of this suit the defendants, Dealers Transport Company, (hereinafter called "Dealers") and E & L Transport Company, (hereinafter called "E & L"), having received notice from the Ford Motor Company that due to a decline in Ford sales in the area there would thereafter be room for the use of only one of these vehicle transport companies in Ford's Louisville operation, devised an arrangement whereby Dealers would sell to E & L and E & L would sell to Dealers such of their respective authority as would allow E & L to concentrate its transportation activities in the more northerly area of the United States and would allow Dealers to concentrate in the more southerly zone.

Due to the withdrawal of E & L from the Louisville area, General Drivers, Warehousemen and Helpers, Local Union No. 89, (hereinafter called the "Union"), the representative of the employees of both E & L and Dealers inquired of E & L as to the nature and cause of its discontinuance of its Louisville operations. As a result of this inquiry, the Union was led to believe that the transaction between the companies involved no trades, sales or exchanges of property, but only a withdrawal by E & L at the direction of the Ford Motor Company. Thus, when E & L employees who began to be laid off started complaining that their

seniority lists should be dovetailed with those of Dealers, the Union's president, Paul Priddy, advised the Dealers employees they had nothing to worry about since, because there was no trade or sale between Dealers and E & L, the E & L employees had no right to the transfer they demanded.

By the time the grievances of the E & L employees reached the Joint Conference Committee, Priddy had become more fully advised of the Dealers-E & L transaction and as a result he recommended to that committee that the seniority lists of the two companies be sandwiched. The Joint Conference Committee accepted this recommendation and subsequently Dealers was instructed to hire E & L employees.

Certain employees of Dealers, being now convinced that their unions had betrayed them, next brought an action in the Kentucky state court praying for an injunction against the Union and Dealers from carrying out the decision of the Joint Conference Committee. The trial court denied an injunction, and though reversed by the Court of Appeals of Kentucky, (Moore v. Local Union 89, International Brotherhood of Teamsters, etc., 356 S.W.2d 241 (1964).), this denial was upheld by the United States Supreme Court. Humphrey v. Moore, 375 U.S. 335 (1963).

Prior to the Supreme Court decision, however, the Union filed suit under Section 301(a) of the National Labor Relations Act, (Title 29 United States Code Annotated, Section 185(a).), asking both for specific performance of the decision of the Joint Conference Committee and for damages in the amount of the wages and salaries lost to E & L employees by reason of Dealers' failure to immediately carry out the Committee's decision. Since the Supreme Court reversed the injunction order of the Kentucky Court of Appeals, Dealers has complied with the Joint Conference Committee's decision to hire certain E & L em-

ployees and consequently the plea for specific performance of that decision is no longer in issue. What remains, then, is the issue of defendants' liability for the loss of E & L employees' wages during the period of the injunction, and it is as to this claim that the defendants have filed their motions for dismissal.

Although E & L's first argument in support of dismissal is that the master contract cannot ground liability to plaintiffs because E & L is not a named party to that contract, it is a well-understood principle of labor law that local parties are bound by a master contract negotiated by their bargaining agent. Fisherty v. McDonald, 178 F.Supp. 544 (D.C. S.D. Cal. 1959). See also Rabouin v. NLRB, 195 F.2d 906, 909-10 (2nd Cir. 1952). Accordingly, by signing the individual contracts defendants merely affirmed the promise of their agent, Automobile Transporters Labor Division, that each would "be bound by all of the terms and provisions of this Agreement and . . by the interpretations and enforcement of the Agreement." Humphrey v. Moore, supra, at p. 339; see also p. 337.

Even if held bound by the collective bargaining agreement, E & L denies having breached its provisions, and it argues that since plaintiffs have pointed to no specific provision which was violated by E & L the complaint should as to it be dismissed. What this argument fails to recognize, however, is that in every contract there is an implied covenant that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." 3 Williston (Rev. Ed. 1936) Section 670 as quoted in Local 1912 International Association of Machinists v. U. S. Potash Company, 270 F.2d 496, 498 (10th Cir. 1959). Therefore, if, as is charged, E & L did misrepresent the nature of its transactions with Dealers in order to deprive its employees of their absorption rights under the contract

there would be a sufficient basis for allowing a finding that E & L has violated the "covenant of good faith and fair dealings . . . which must inhere in every collective bargaining agreement if it is to serve its institutional purposes." United Steelworkers v. New Park Mining Company, 273 F.2d 352, 356 (10th Cir. 1959). See also Helene Curtis Industrial Industries, Inc. v. United States, 312 F.2d 774, 778 (Ct.Cl. 1963), and Line Drivers Local 961 v. Digby, Inc., 58 LRRM 2534, 2536 (10th Cir. 1956).

Closely related to E & L's second argument is its contention that since the complaint charges conspiracy and misrepresentation the action is one for tort rather than for breach of contract, and recovery for a tort is not allowed under Section 301(a). The fault of this argument rests in its failure to recognize that while conspiracy and misrepresentation might very well be tortious, this does not prevent it from also constituting a breach of the implied covenant of good faith.

Other problems relating to the proper classification of the wrong charged in the complaint are presented by Dealers. Thus, since the complaint charges that Dealers and E & L conspired together to deprive plaintiffs of their absorption rights, Dealers argues that this action is barred by the Kentucky one year period of limitations applicable to conspiracies. (See KRS 413.130(c).) The fallacy of this argument rests in the fact that " 'a cause of action does not consist of facts . . . but of the unlawful violation of a right which the facts show,' " (Hurn v. Oursler, 289 U.S. 238, 246 (1933). See also UMWA v. Meadow Creek Coal Company, 263 F.2d 52, 59 (1959).), and consequently, since if the acts alleged are true they violate plaintiffs' contractual rights, the proper designation of plaintiffs' claim here is that of breach of contract. For where doubt exists as to the applicable period of limitation the courts lean toward application of the longer period. Hughes v. Reed, 46 F.2d 435 (10th Cir. 1931).

Dealers second argument is that this suit is barred by the Humphrey v. Moore determination that "No fraud is charged against the employer . . ." Humphrey v. Moore, supra, p. 368. The contention is without merit. In the language quoted the Court was speaking only of what was in that case *charged*. Since no fraud was there charged, on no theory could this issue have been a "question of fact essential to the ... . judgment" in that case. See Fiberboard Paper Products v. Machinists, 58 LRRM 2387, 2391 (9th Cir. 1965); Restatement of the Law of Judgments, Section 68, Comment O.

Dealers next argues that although Section 301(a) allows recovery "for violation of contracts between an employer and a labor organization representing employees in an industry," the employees meant to be designated are only those of the breaching employer. More precisely, it is Dealers' contention that "employees" as used in Section 301(a) must be defined as only employees of the offending employer, and since the employee plaintiffs of this case were not employees of Dealers, but were employees of E & L, Dealers argues that Section 301 does not allow the recovery here sought against it. Once again the argument must fail, for as was stated by the Supreme Court in Phelps Dodge Corp. v. Labor Board, 313 U.S. 177, 191-92 (1941), the term "employee" as defined and used in the National Labor Relations Act, (See Title 29 U.S.C.A. Section 152(3).), " 'shall include any employee, and shall not be limited to the employees of a particular employer . . .'" See also John Hancock Mutual Life Insurance Company v. National Labor Relations Board, 191 F.2d 483, 485 (D.C. Cir. 1951).

Though it admits that it had a contractual obligation to carry out the decision of the Joint Conference Committee, Dealers argues that it was excused from that obligation by the injunction prohibiting compliance. But it is quite clear that the rule excusing performance of a contract where

it is forbidden by a judicial order is not applied where the fault of the party owing performance contributed to the order, (See Restatement of the Law of Contracts, Section 458.), particularly where the contributory fault is fraud, (See Seedman v. Friedman, 132 F.2d 290, 296 (2nd Cir. 1942).), and thus since the facts alleged in this case would constitute such contributory fault, Dealers cannot be allowed dismissal on the basis of the injunction alone.

The final argument which Dealers makes on behalf of its motion for dismissal is that because plaintiffs have failed to allege that they have carried out the provisions of Article 9 of the collective bargaining agreement requiring that "An appeal from discharge, suspension or warning notice must be taken within ten (10) days by written notice, and a decision reached within thirty (30) days from the date of discharge, suspension or warning notice," the complaint is fatally defective. Although plaintiffs make no attempt to answer this contention, it is obviously fruitless, since even if it be assumed that Article 9 does require, as a condition precedent to the bringing of a court action, some appeal from a "discharge, suspension or warning notice," the present suit complaint of neither a discharge, suspension nor warning notice, but rather of the failure of Dealers to hire them in the first place. For this reason, Dealers' fifth argument in support of dismissal must be rejected, and since all the other reasons argued by defendants in support of their motions were similarly rejected, those motions are denied.

IT IS SO ORDERED.

/s/ HENRY L. BROOKS
United States District Judge

August 10, 1965

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 4709

WALTER HUMPHREY, ET AL., *Plaintiffs*

v.

DEALERS TRANSPORT, ET AL., *Defendants*

Order

A pretrial conference was held in this case on August 30, 1967, and the order provided that the defendants, Dealers Transport, et al., submit findings of fact and conclusions of law and tender judgment in conformance with the oral opinion rendered by the Court.

The tendered findings of fact and conclusions of law and the objections thereto have been considered, and

IT IS NOW ORDERED AND ADJUDGED that the tendered findings of fact and conclusions of law are adpoted as the facts and the law of this action and plaintiffs' complaint is dismissed.

/s/ HENRY L. BROOKS
Henry L. Brooks
United States District Judge

October 19, 1967

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 4709

Findings of Fact and Conclusions of Law

1. The defendants, Dealers Transport Company and E and L Transport Company, were each in the business of transporting new Ford automobiles from the assembly plant in Louisville, Kentucky. In the face of declining business resulting from several factors, the two companies were informed by Ford that there was room for only one of them in the Louisville operation. After considering the matter for several months the two companies made an arrangement whereby E and L would sell to Dealers its secondary authority out of Louisville, the purchase price to be a nominal sum approximately equal to the cost of effecting the transfer of authority; E and L would also sell to Dealers its authority to serve certain points in Mississippi and Louisiana. Dealers would sell to E and L its initial authority out of Lorraine, Ohio. These transfers were subject to the approval of the Interstate Commerce Commission and the proceedings were of public record.

2. The employees of both E and L and Dealers were represented by Teamsters Local Union # 89. Paul Priddy, President of Local # 89, as the result of inquiry from E and L by his assistant, understood that the transaction between the companies involved no trades, sales or exchanges of property but only a withdrawal by E and L at the direction of the Ford Motor Company.

3. It is the position of the plaintiff that the information furnished to the Union by E and L and Dealers was intentionally erroneous. It is further their position that said erroneous information constituted fraud by the defendants. It is clear from the record, however, in Hum-

phrey v. Moore, 375 U.S. 335 (1964), that all of the facts were subsequently known and were timely presented to the Joint Grievance Committee at Detroit. Clearly, the decision of the Joint Committee was in no way influenced or made erroneous by the alleged antecedent fraud of the defendants. As pointed out by the Supreme Court in Humphrey v. Moore, supra, the Dealers employees were represented at the hearing and they did not request a continuance in order to be better represented after they found out that Priddy was going to recommend that the Seniority Boards of the two companies be dovetailed.

4. As also stated in that decision, the Dealers employees in no way suggested what they could have added to the hearing by way of facts or theory if they had been differently represented. The Supreme Court agreed with the opinion of Judge Smith in the Jefferson Circuit Court that it would be "idle speculation to assume that the result would have been different had the matter been differently presented." Humphrey v. Moore, supra.

5. The decision of the Committee was within its power, as so stated by the Supreme Court, and its decision was both fair and equitable.

6. The defendant, Dealers, maintained a neutral position throughout the entire Joint Grievance Committee hearing. After the Joint Committee's decision, Dealers Transport started to implement said decision by laying off some of its employees and by hiring E and L employees. (Snipes deposition p. 90). At this time a group of Dealers employees filed suit in the Jefferson Circuit Court seeking to enjoin implementation of the Joint Committee decision. The Circuit Court upheld said decision but on appeal the Court of Appeals of Kentucky issued an injunction. When the injunction was issued Dealers ceased sandwiching the two Seniority Boards, discharged the E and L employees and rehired its own previous employees.

7. Plaintiffs argue that the alleged antecedent fraud of Dealers and E and L permiated all actions that occurred thereafter. They argue that this fraud caused and brought about the law suit that was filed by the Dealers employees and as a result the ultimate injunction that was issued by the Kentucky Court of Appeals. Plaintiffs argue that Dealers was forced to obey the decision of the Joint Committee. This latter point is true, however, the injunction was legally binding on Dealers Transport and they had no choice but to cease sandwiching the two employee Boards.

8. Plaintiffs argue that the defendants cannot use the injunction as a defense because they were bound to prevent the injunction from being issued and they were further bound to take all possible steps to void said injunction once it had been issued. Plaintiffs cite a great deal of authority to support this position; however, said authority is totally distinguishable upon the facts. Plaintiffs' cases for the most part deal with a situation where there is a contractual agreement between two parties and one of the parties either through its own action or by inaction allows an injunction to be issued against it, thereby preventing said party from fulfilling its contractual obligations. In the instant case the facts are totally different. As pointed out by every court that considered the case of Humphrey v. Moore, the employer, Dealers Transport, considered the controversy to be a dispute within the Union. Dealers Transport remained neutral. Even though Dealers Transport was bound to enforce the Joint Committee decision it could not and did not have any power to prevent the law suits that were in fact filed. In fact, for Dealers to have taken a position of advocacy, either for or against either one of the employee groups, would have no doubt constituted an unfair labor practice. Title 29 United States Code Section 158. Dealers Transport was helpless to prevent the injunction that was issued. The Defendant, E and

L Transport Company, was not even a party to the injunction proceedings and the litigation in Humphrey v. Moore and obviously cannot be charged with any negligence or liability for action or inaction in that litigation. Plaintiffs' contention that there would not have been an injunction nor any law suit had it not been for the antecedent fraud of the defendants is a very speculative and tenuous theory that pyramids inference upon inference. If the Joint Committee decision was fair, as the Supreme Court has held, then surely all that took place afterwards cannot be blamed upon the alleged antecedent fraud.

9. To assume that there would not have been a law suit challenging the Joint Committee's decision had the defendants not engaged in the alleged misrepresentation is to be very naive. The statements by Priddy to the E and L employees that their jobs were tenuous, caused them to file a grievance. The Court cannot now say that if the opposite information had been given to the respective employees that there would not have been a grievance filed by the Dealers employees. In fact the history of this case quite clearly shows that there would have been a grievance filed. Instead of filing a grievance the Dealers employees presented their case before the Joint Committee. In addition those unsuccessful Dealers employees filed a suit to challenge the Committee's decision. It is quite fair to assume that had the Dealers group been successful before the Joint Committee that the E and L employees would have filed a similar suit.

10. Plaintiffs argue that Dealers should have been more of an advocate in its attempt to prevent the injunction and to set aside said injunction. It is true that Dealers maintained its neutraility (sic) in all Courts, however, the respective employees of both companies were adequately represented at all stages of the proceedings. It would hav been quite futile for Dealers to have been more of an advocate, and this Court is certainly not prepared to say

that the result would have been any different regardless of the position Dealers might have taken.

11. This Court interprets Humphrey v. Moore as approving, or certainly not condemning, the position that Dealers took. In addition, the very recent Kentucky case of Ball v. Eastern Coal Corporation, Ky., 415 S.W. 2d 620 (March, 1967), was a case with very, very similar facts to Humphrey v. Moore. Judge Palmore followed Humphrey v. Moore and in that case approved of the relatively neutral position taken by the employer.

12. Dealers Transport Company argues in this Court that the issue of fraud was settled in the case of Humphrey v. Moore. It is true, as stated in the Supreme Court decision, that there were no allegations of fraud against Dealers. Plaintiffs argue that this is not dispositive of the issue, however, since it was not necessary to raise that issue in that case. This position is not persuasive. The reading of Humphrey v. Moore, as well as the reading of the record in this case, coupled with the statements of plaintiffs' counsel as to what plaintiffs plan to prove in this case, if same should be tried, indicates that the alleged fraud committed by Dealers and E and L is without merit. It should be noted that the plaintiffs, Dealers Transport, Local #89 and the Dealers employees were all parties to Humphrey v. Moore. It is hard to believe that if any party in the former law suit had considered Dealers guilty of any misrepresentation that they would not have raised said issue in the first law suit. To raise same now seems to be an afterthought.

CONCLUSIONS OF LAW

13. It is the finding of this Court that even if the defendants, Dealers Transport and E and L Transport, were guilty of fraud as alleged by the plaintiffs, said misrepresentations were adequately discovered by the plaintiffs

and/or their representatives in advance of the Joint Grievance Committee hearing in Detroit. As a result, the plaintiffs were in no way misled by said fraud, they did not rely to their detriment on said statements, and any possible adverse effects said fraud could have had were cured by the full hearing that was held at Detroit and whose decision was found by the Supreme Court to be fair and equitable. Morgan v. Graham, 228 F.2d 625 (10th Cir. 1956); Wilson v. Henry, Ky., 340 S.W. 2d 449 (1960); O'Brien v. Marvin, Ky., 387 S.W. 2d 282 (1965); Snyder v. Rhinehart, 274 Ky. 274, 118 S.W. 2d 543 (1938); McGuffin v. Smith, 215 Ky. 606, 286 S.W. 884 (1926); 23 Am. Jur., Fraud and Deceit, sec. 141 et seq.

14. The alleged antecedent fraud of the defendants was not responsible for the law suit that was filed by Dealers employees. It would be stretching the imagination to rule as a matter of law that but for said alleged fraud no law suits would have been filed.

15. In addition, it is the opinion of the Court that it was impossible for Dealers Transport to prevent the issuance of the injunction by the Kentucky Court of Appeals. As a result they had no choice but to obey said injunction and to cease implementing the decision of the Joint Grievance Committee. Chicago, B & Q R.R. Co. v. Fowler, 27 S.W. 2d 72 (1930).

16. Likewise, the neutral position taken by Dealers throughout the controversy was fair and necessary. Title 29 United States Code 158; Ball v. Eastern Coal Corporation, Ky., 415 S.W. 2d 620 (1967).

17. All parties to Humphrey v. Moore were more than adequately represented, especially these plaintiffs who were successful in said litigation. It would have been futile for Dealers to have taken a more active role in said law suit. It is idle speculation for the plaintiffs to argue that

Dealers could have in any way changed the course of events that occurred in that law suit.

18. Inasmuch as defendant, E and L Transport Company, was not a party to the litigation, it could not be charged with any responsibility or liability for any alleged damages resulting from the injunction.

19. Even if plaintiffs' theories of fraud and misrepresentation were deemed actionable, this Court finds that as a matter of law no damages will lie for the period of delays during which the injunction of the Court of Appeals was in effect.

20. If Dealers has improperly sandwiched any former E and L employees into its operation, then said employees have a remedy under the Grievance procedure of their contract in Article 4, Section 1.

Judgment in accordance with these findings of fact and conclusions of law is this day ordered.
October 19, 1967

/s/ HENRY L. BROOKS
Henry L. Brooks
United States District Judge

APPENDIX C

[Filed January 10, 1969]

NO. 18,502
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WALTER HUMPHREY, DONALD V. MALONE, ROBERT KALWAT, and MARION A. SACKSTEDER, *Plaintiffs-Appelants,*

v.

DEALERS TRANSPORT COMPANY, and E & L TRANSPORT COMPANY, *Defendants-Appellees.*

Order

BEFORE: O'SULLIVAN and CELEBREZZE, Circuit Judges, and MCALLISTER, Senior Circuit Judge.

The above cause coming on to be heard upon the briefs and record, and the arguments of the parties in open court, and the Court being duly advised,

Now, therefore, it is hereby ORDERED, ADJUDGED and DECREED that the judgment be and is hereby affirmed for the reasons set forth in the Findings of Fact and Conclusions of Law of Judge Henry L. Brooks.

ENTERED BY ORDER OF THE COURT

CARL W. REUSS
Clerk